No. 44305-8-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

KENNETH HAUGE,

Appellant,

v.

CITY OF LACEY, a municipal corporation, and
THURSTON COUNTY, a subdivision of Washington State,

Respondents.

BRIEF OF APPELLANT

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A. INTRODUCTION

This appeal arises from two lawsuits between Ken Hauge and the City of Lacey arising out of a six year transportation improvement project ("the project") the City developed in the area near Ken's home, which sits at the corner of Carpenter Road and 6th Avenue Southeast in unincorporated Thurston County. The first lawsuit involved the City's appropriation of a portion of Ken's property needed for the project. That lawsuit culminated in a stipulated settlement: the City paid Ken $150,000 as the fair market value of the 4,058 sq. ft. right-of-way it appropriated for the project.[1] The settlement specifically preserved for Ken all other causes of action that he might have against the City related to the project.

The second lawsuit, which gives rise to this appeal, involved Ken's claims for damages arising from the project for which he was not compensated by the City in the first lawsuit. In particular, Ken alleged: (1) that the City failed to construct a retaining wall on the right-of-way according to the manufacturer's specifications, which created a substantial and on-going risk of collapse; (2) that the City failed to install a sound barrier, which rendered the property uninhabitable due to the decibel level of traffic and the vibrations arising from it once Carpenter Road was improved; (3) that the City and its employees or agents were hostile and

[1] A copy of the stipulation is in the Appendix.

aggressive toward Ken and his mother; (4) that the City took or damaged additional property for public use outside the scope of the original taking without just compensation; and (5) that the City removed three trees located outside of the right-of-way but on Ken's property without just compensation. Ken characterized the majority of his claims as claims for inverse condemnation. The City moved to dismiss the complaint under CR 12(b)(6); however, the trial court considered the motion as one for summary judgment because both parties submitted supporting declarations. It ultimately granted the motion and dismissed the complaint.

Ken appeals the dismissal of his lawsuit and the denial of his cross-motion for partial summary judgment. The trial court erred by dismissing his lawsuit because the court did not resolve all of his claims on summary judgment; instead, it focused only on his takings claims in reaching its decision. But even if the trial court did consider Ken's other claims, summary judgment was inappropriate because genuine issues of material fact remained. The trial court further erred by misconstruing the terms of the stipulation and by misapplying Washington's takings law. This Court should reverse the trial court's dismissal order and remand for further proceedings on the merits.

B. ASSIGNMENTS OF ERROR

(1) Assignment of Error[2]

1. The trial court erred when it dismissed Ken's complaint against the City and denied his cross-motion for summary judgment on October 26, 2012.

(2) Issues Pertaining to Assignment of Error

1. Did the trial court erroneously dismiss a lawsuit when it failed to resolve all of the plaintiff's claims on summary judgment and a number of the plaintiff's claims therefore survived dismissal? (Assignment of Error No. 1)

2. Did the trial court erroneously dismiss a complaint when it failed to construe the facts in a light most favorable to the non-moving plaintiff and the plaintiff raised genuine issues of material fact sufficient to preclude dismissal of his entire lawsuit? (Assignment of Error No. 1)

C. STATEMENT OF THE CASE

Ken Hauge became permanently disabled after suffering a massive Grand Mal seizure[3] in 2000 that left him with multiple spinal fractures and neurological damage. CP 202. He lives a marginally functional life that he manages in large part by isolating himself from people, light, heat, and

[2] The trial court's order is in the Appendix.

[3] Grand Mal seizures are generalized epileptic seizures produced by electrical impulses from throughout the entire brain. In this type of seizure, the patient loses consciousness and usually collapses. The loss of consciousness is followed by generalized body stiffening for 30 to 60 seconds, then by violent jerking for 30 to 60 seconds, after which the patient goes into a deep sleep. During grand-mal seizures, injuries and accidents may occur. http://www.webmd.com, last visited May 8, 2013.

noise. *Id.*; CP 209. He lives in a vicious cycle of pain, insomnia, and depression. *Id.*

Ken lives with his elderly mother, Helen Hauge. CP 202. They both suffer from physically induced angioedema,[4] a condition triggered by a number of factors including noise and vibration. *Id.* Helen suffered a stroke in 2012 that left her more frail and vulnerable than before. *Id.*

When Ken began looking to buy a home for himself and his mother, he had a number of very specific and essential criteria in mind to accommodate their current and future needs based on their medical conditions. *Id.* For example, he wanted a quiet, private, and heavily shaded location with multiple residences on the lot. *Id.* He also wanted a large lot that was zoned to permit the potential construction of an additional residence. *Id.*

In January 2007, Ken found the property that he was looking for in unincorporated Thurston County. CP 201. The property, which was originally more than half an acre, sits at the corner of Carpenter Road and 6th Avenue Southeast, just outside the limits of the City of Lacey. *Id.* It has a main house and a permitted auxiliary dwelling unit ("ADU"). CP 203. Ken has remodeled and completed the ADU to meet his specific

[4] Angioedema is an allergic reaction similar to hives, but the swelling occurs under the skin instead of on its surface. Symptoms may include swelling around the eyes and lips. In severe cases, swelling in the tongue or throat can cause breathing problems, which can be life-threatening. http://www.webmd.com, last visited May 8, 2013.

needs. *Id.* He lives in the ADU and Helen lives in the main house. *Id.* The property was zoned residential and permitted six homes per half acre.

When Ken purchased the property, Carpenter Road was a two lane road with a speed limit of 35 mph. CP 81, 202, 268. Traffic was light and the road was largely traveled by local residents. *Id.* Neither Ken nor Helen noticed the vast majority of what traffic there was on the road. CP 148, 202. A large buffer of old growth trees and dense native foliage separated the two residences from Carpenter Road. CP 202-03.

In May 2008, the City posted a public notice to announce a hearing in June 2008 to address a six year transportation project ("the project") that it planned for the area. CP 5, 265. A key component of the project was the improvement of Carpenter Road, which would be widened to accommodate a four lane arterial, with additional turn lanes where required. *Id.*; CP 265, 268. Although the City negotiated settlements with a number of property owners along Carpenter Road to acquire the necessary rights-of-way for the project, it failed to contact Ken before the project began. CP 6; RP 4.

In May 2009, the City began pre-construction activities related to the project on Ken's property without prior notice. CP 6. He objected and spent nearly a year negotiating with the City over its request for a 4,058 sq. ft. right-of-way over his property for the project. CP 6-7.

The City eventually filed a condemnation action against Ken and one other defendant in April 2010.[5] CP 7, 32, 203, 329-30. In Ken's case, the City sought to acquire a 4,058 sq. ft. section of his property for the project.[6] CP 147, 203. The litigation was contentious. CP 203. Ken knew that the right-of-way would destroy the character of his property and devastate his health and already limited quality of life. CP 147-48, 203. He believed that the City should condemn the entire property and not just the portion it needed for the right-of-way. CP 148. The City refused. *Id.*; CP 203.

On the eve of the condemnation trial, the City and the County agreed to pay Ken $150,000 as the fair market value of the 4,058 sq. ft. portion of property being appropriated for the project. CP 203, 216-20. On February 25, 2011, the parties entered into a stipulated agreement whose terms also specifically preserved for Ken all other causes of action related to the project, including the claims made in the instant lawsuit:

> It is further agreed by the [City and the County] that neither this Stipulation nor the Judgment and Decree to be entered herein shall in any manner be used to prevent [Ken] from filing a separate action for displacement, negligence, personal injury, or any other road related action on the part

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[5] *City of Lacey et al. v. Carpenter Crest, L.L.C. et al.*, Thurston County Cause No. 10-2-0663-7.

[6] The City later added Thurston County as a co-petitioner in the condemnation action because it lacked the necessary standing to condemn Ken's property where the property was not located within the city limits. CP 7, 20.

> of the [City and the County] or their contractors or agents in constructing the Carpenter Road Improvement Project or relating to such roadway.

CP 148, 218. A decree of appropriation was entered on March 28, 2011. CP 222, 314-16, 322-24. After the City's acquisition, Ken's property fell below the threshold requirement for its original R6 zoning and was down-zoned. CP 7.

Following the condemnation proceeding, the City began work on the right-of-way. CP 8. When a dispute arose between Ken and the City over several trees on the property, the City sought and obtained an injunction in the original condemnation action preventing Ken from interfering with the removal of three trees on the property but located outside the right-of-way. CP 36-37, 62-63, 204. Ken was further enjoined from interfering with the project. CP 63.

Ken filed a complaint against the City and the County in the Thurston County Superior Court in June 2012, alleging among other things that the City's construction work damaged his property and constituted an additional, uncompensated taking. CP 4-10. The City moved to dismiss the complaint pursuant to CR 12(b)(6); however, it asked that the trial court treat the matter procedurally as one for summary judgment because it submitted declarations from several experts and other

evidence beyond the complaint to support the motion.[7] CP 18-73. Ken responded, pointing out among other things that the property identified in his lawsuit was not the same section of property that the City had acquired through the condemnation proceeding and that the City was taking additional property beyond what it acquired with the right-of-way. CP 91, 97, 140. He also cross-moved for partial summary judgment on the City's liability and submitted a declaration from his geotechnical engineer to support the motion. CP 74-103, 139-49. He then filed an amended complaint to add a claim for severance damages. CP 150-57.

The trial court, the Honorable William Thomas McPhee, heard the City's motion to dismiss on October 26, 2012. RP 1-32. The trial court considered the pleadings filed in the underlying action and also the amended order of public use and necessity, the judgment, the stipulation, and the decree of appropriation entered in the earlier condemnation proceeding. RP 10-12, 20, 26-31; CP 197, 314-24, 329-30. It then issued an order granting summary judgment to the City and dismissing Ken's claims with prejudice. CP 196-97. It denied Ken's cross-motion for summary judgment, CP 197.

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[7] The County also moved to dismiss Ken's complaint pursuant to CR 12(b)(6). CP 11-24. Ken later stipulated to the dismissal of all claims against the County, without prejudice. CP 104-05.

Ken moved for reconsideration, CP 160-72, which the trial court denied on November 14, 2012. CP 193-95. Ken's timely appeal followed. CP 192.

D. SUMMARY OF ARGUMENT

The trial court considered the City's motion to dismiss Ken's complaint under CR 12(b)(6) as one for summary judgment because both parties submitted supporting declarations. The court made three mistakes when it summarily dismissed Ken's complaint.

First, the trial court did not resolve all of Ken's claims on summary judgment. It focused only on his takings claims and failed to consider the nature or sufficiency of his remaining claims, which he characterized as abuse and retaliation claims. The trial court compounded its error by refusing to grant partial summary judgment to Ken on those additional claims because the City conceded them. At a minimum, Ken's other claims remained viable and the trial court erred by dismissing them. But even if the City challenged Ken's additional claims and the trial court properly considered them, summary judgment was still inappropriate because genuine issues of material fact remained.

Second, the trial court misunderstood the nature and scope of the stipulation and thus its impact on the parties' dispute. The stipulation unambiguously exculpates the City only for its taking of 4,058 sq. ft. of

Ken's property for public use and nothing more. The stipulation *does not exonerate the City for the additional property* that it has taken and destroyed beyond the acquired right-of-way. By its plain terms, the stipulation did not preclude a lawsuit by Ken for any other road-related claims arising from the project. This includes the claims made in the underlying lawsuit.

Finally, the trial court misapplied Washington's takings law. The fundamental flaw in the trial court's analysis is that the City took more property from Ken than what it paid just compensation for in the original condemnation action. While the City's $150,000 payment may have covered its appropriation of the right-of-way, it did not extend to the subsequent takings. The additional takings are outside the boundaries of the right-of-way; thus, the City directly appropriated additional land from Ken for which it owed him just compensation.

This Court should reverse the trial court's summary judgment order and remand for trial on the merits. Costs on appeal should be awarded to Ken.

E. ARGUMENT

(1) Standard of Review

Under CR 12(b)(6), "a defendant may move to dismiss where a plaintiff's pleadings do not state a claim for which relief can be granted."

Mueller v. Miller, 82 Wn. App. 236, 245-46, 917 P.2d 604 (1996) (citing *Danzig v. Danzig*, 79 Wn. App. 612, 616, 904 P.2d 312 (1995), *review denied,* 129 Wn.2d 1011 (1996)). A motion to dismiss for failure to state a claim is treated as a motion for summary judgment when matters outside the pleadings are presented to, and not excluded by, the trial court. CR 12(b); *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 802, 699 P.2d 217 (1985); *Berst v. Snohomish County*, 114 Wn. App. 245, 251, 57 P.3d 273 (2002).

Here, the trial court considered materials outside of the pleadings when it considered the City's motion to dismiss under CR 12(b)(6). RP 10, 26. This Court thus reviews the motion *de novo*, as if it were a summary judgment motion. *See* CR 12(b); *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 297, 545 P.2d 13 (1975).

In reviewing a grant of summary judgment, this Court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The Court must consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Id.* Summary judgment is proper when the record presents no genuine issues of material fact and the moving party is entitled to judgment as a

matter of law.[8] CR 56(c). But a trial is absolutely necessary if there is a genuine issue as to any material fact. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975); *Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974); *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960).

(2) The Trial Court Erred by Dismissing Ken's Complaint and Denying His Cross-Motion for Summary Judgment

Ken made a number of claims in his complaint, most of which he considered to be inverse condemnation claims. The trial court dismissed the complaint in its entirety, concluding that he did not retain the right to seek compensation from the City for damage to his property by virtue of the City's taking because he had been compensated for it in the original condemnation action. RP 30-31. This was error.

The trial court made three crucial mistakes when it granted the City's motion to dismiss and denied Ken's cross-motion. First, it did not resolve all of Ken's claims on summary judgment. Second, it misunderstood the nature and scope of the stipulation and thus its impact on the parties' dispute. Finally, it misapplied Washington's takings law.

[8] A material fact is one upon which the outcome of the litigation depends. *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998).

(a) The trial court failed to resolve all of Ken's claims on summary judgment

Ken's complaint is not a model of clarity,[9] but construed most favorably to him, it alleges that he suffered damages caused by: (1) the City's failure to construct a retaining wall on the right-of-way according to the manufacturer's specifications; (2) the City's failure to install a sound barrier to mitigate traffic noise; (3) the hostility and aggressiveness of the City and its employees or agents; (4) the City's failure to pay just compensation for the taking of additional property for public use; and (5) the City's failure to pay just compensation for the removal of three trees located outside of the right-of-way but on his property.[10] CP 7-10. Because he did not base his claims for relief solely on the inverse condemnation action, the trial court and the City were on notice that he was also seeking relief for the City's negligence and retaliation. *Nelbro Packing Co. v. Baypack Fisheries, L.L.C.*, 101 Wn.

[9] Washington is a notice pleading state; accordingly, the courts require only a "short and plain statement of the claim showing that the pleader is entitled to relief." CR 8(a)(1); *Champagne v. Thurston County*, 163 Wn.2d 69, 84, 178 P.3d 936 (2008). The pleadings must be construed to do substantial justice. CR 8(f). *See also, Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 23, 974 P.2d 847 (1999) (noting inexpert pleading is permitted); *State v. Adams*, 107 Wn.2d 611, 620, 732 P.2d 149 (1987) (citing *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983)) (noting pleadings are to be liberally construed).

[10] Ken later added a claim for severance damages. CP 156. He sought leave to amend his complaint a second time to add a negligence claim; however, it appears that the amendment never occurred because the trial court dismissed the complaint on summary judgment. CP 91.

App. 517, 6 P.3d 22 (2000) (holding that when the facts give rise to more than one legal right or cause of action, or there is more than one possible form of recovery and they are not mutually exclusive, the claimant has presented multiple claims for relief).

Ken moved for partial summary judgment to establish the City's liability for his inverse condemnation claims. He supported the motion with his declaration and the declaration of his geologic engineer, Blaise Jelinek. CP 74-88, 90-102. The City responded, submitting contrary declarations from two of its experts. CP 106-15, 134-36. Ken also moved to summarily establish the City's liability on what he characterized as his abuse and retaliation claims, which he supported with video clips documenting a number of hostile and retaliatory encounters with employees or agents of the City. CP 204-05. But the City failed to respond to these specific contentions; accordingly, it conceded them. *See, e.g., American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991).

Despite the uncontested nature of Ken's allegations, the trial court dismissed his complaint in its entirety. The trial court erred because it focused exclusively on Ken's takings claims, RP 26-30, without considering the nature or sufficiency of his remaining claims. It compounded this error by refusing to grant partial summary judgment to

Ken where the City failed to dispute the remaining claims. At a minimum, Ken's other claims remained viable and the trial court erred by dismissing them.

But even if the City challenged Ken's additional claims and the trial court considered them, summary judgment was still inappropriate because genuine issues of material fact remained. For example, Ken asserted that the City took *additional* property from him for the project outside the scope of the original right-of-way for which he had not been compensated. CP 204-05. The City disagreed, CP 24, which created a classic "he said, she said" dilemma for which summary judgment was ill-suited. *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 624, 128 P.3d 633, *review denied,* 158 Wn.2d 1015 (2006) (noting neither the trial court nor the appellate court will weigh the evidence or assess witness credibility on a motion for summary judgment).

Ken also claimed that the City failed to construct the retaining wall on the right-of-way according to the manufacturer's specifications, damaging his property and posing a significant risk of future collapse. CP 90-93. He presented expert testimony on the issue. CP 74-88. The City disagreed, presenting testimony from its own expert. CP 111-13, 135-36. The experts' dueling opinions addressed ultimate issues of fact sufficient to create a genuine issue as to those facts, precluding summary

judgment. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 588 P.2d 1346 (1979); *Bowers v. Marzano*, 170 Wn. App. 498, 290 P.3d 134 (2012). *See also, DiBlasi v. City of Seattle*, 136 Wn.2d 865, 879, 969 P.2d 10 (1998) (where two competent experts disagree, creating a genuine issue of material fact, summary judgment is inappropriate); *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 106 P.3d 258, *review denied,* 155 Wn.2d 1026 (2005) (noting genuine issue of material fact existed, thereby precluding summary judgment, where both home buyer and builder offered conflicting expert opinion evidence).

Having raised genuine issues of material fact with respect to his additional claims, the trial court erred by dismissing Ken's complaint in its entirety. Ken should have his day in court. Accordingly, the Court should reverse and remand for trial.

(b) The trial court misconstrued the stipulation and its impact on the current litigation

The trial court analyzed a number of pleadings filed in the original condemnation proceeding, including the stipulation, to decide the City's motion to dismiss. It failed to make a number of critical distinctions when it considered the nature and scope of the stipulation and its impact on the underlying lawsuit.

Courts interpret stipulations between the parties in the same manner as contracts. *Riley Pleas, Inc. v. State*, 88 Wn.2d 933, 937-38, 568 P.2d 780 (1977) (noting a compromise or settlement agreement is a contract and its construction is governed by the legal principles applicable to contracts). The touchstone of contract interpretation is the parties' intent. *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996); *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). Interpretation of a contract provision is usually a question of fact.[11] *Martinez v. Miller Industries*, 94 Wn. App. 935, 943, 974 P.2d 1261 (1999).

When analyzing the parties' intent, the Court must examine not only the four corners of any writing the parties may have signed, but also the circumstances leading up to and surrounding the writing. *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 8, 937 P.2d 1143 (1997). In considering the agreement's surrounding circumstances, the Court examines the parties' objective manifestations of intent, but not their unilateral or subjective purposes and intentions about the writing's meaning. *Id.* at 9. *See also, Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (noting a court must attempt to

[11] Contract interpretation is only a matter of law when the interpretation does not depend on extrinsic evidence, or the extrinsic evidence permits only one reasonable interpretation. *TransAlta Centralia Generation, LLC v. Sicklesteel Cranes, Inc.*, 134 Wn. App. 819, 826-27, 142 P.3d 209 (2006).

ascertain the parties' intent from the ordinary meaning of the words within the contract). In other words, the Court "strives to ascertain the meaning of what is written in the contract, and not what the parties intended to be written" but did not memorialize. *Bort v. Parker*, 110 Wn. App. 561, 574, 42 P.3d 980, *review denied,* 147 Wn.2d 1013 (2002). *See also, J.W. Seavey Hop Corp. of Portland v. Pollock*, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944) (noting the courts do not interpret what was intended to be written, but what was written).

If a contract's language is clear and unambiguous, then the Court must enforce the contract as written. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997). Extrinsic evidence offered to contradict the terms of an unambiguous contract is inadmissible. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

Here, the stipulation stated:

> The Respondent, KENNETH R. HAUGE, is the owner of that certain real property referred to as Parcel 8 and legally described in Article VII of the Amended Petition for Condemnation.

CP 216. It further stated that the City was "appropriating to THURSTON COUNTY that certain right-of-way described and shown" on the exhibit attached to the stipulation, which measured 4,058 sq. ft. CP 217. In return, the City agreed the "fair market value of the right-of-way together

with all costs of evaluation and any other costs and fees incurred . . . is the sum of $150,000." *Id.*[12]

The first critical distinction that the trial court failed to make is that the stipulation unambiguously exculpates the City only for its taking of 4,058 sq. ft. of Ken's property for public use and nothing more. The stipulation *does not exonerate the City for the additional property* that it took and destroyed beyond the acquired right-of-way. Ken presented evidence that construction workers intentionally moved a fence on the right-of-way to take property that still belonged to him and was outside the right-of-way. CP 204. When he confronted ACI Superintendent Mike Tenant about the additional taking, Tenant told him not to complain because Ken Ahlf, the City's attorney, told the workers that they could take an additional 15 ft. on Ken's side of the right-of-way. CP 204-05. Ken also presented evidence that the retaining wall the City installed on the right-of-way as part of the project encroached onto his property and was a significant safety hazard. CP 77-79, 205. Further, the wall as actually constructed does not allow Ken to install a fence on his property because any fence would have to be installed at least three feet behind the already encroaching wall, which would effectively give the City a third

[12] The City admits that it did not draft a clear agreement. RP 21. If the Court determines that the stipulation is ambiguous, then it should construe the stipulation against the City as the drafter. *Berg*, 115 Wn.2d at 677.

piece of Ken's property beyond the 4,058 sq. ft. it acquired and paid for in the condemnation action.

Similarly, the stipulation does not exonerate the City for its uncompensated taking of three trees located on Ken's property and outside of the right-of-way. Although the City obtained an injunction preventing Ken from interfering with the removal of those three trees, there is nothing in the trial court's order to suggest that the court found that Ken had been compensated for the taking. That issue was simply not before the court. Where the three trees were outside the right-of-way, the City was not entitled to take them without compensating Ken for the taking. It did so anyway.

The second critical distinction that the trial court missed is that the stipulation, by its plain terms, did not prevent Ken from suing the City for any other road-related claims arising from the project. This right would include the claims made in the underlying lawsuit. The stipulation specifically stated:

> It is further agreed by the [City and the County] that neither this Stipulation nor the Judgment and Decree to be entered herein shall in any manner be used to prevent [Ken] from filing a separate action for displacement, negligence, personal injury, or any other road related action on the part of the [City and the County] or their contractors or agents in constructing the Carpenter Road Improvement Project or relating to such roadway.

CP 148, 218. Without explanation, the trial court ignored this reservation of rights and its impact on Ken's claims.

Finally, the trial court failed to recognize that the property at issue in Ken's lawsuit was not the same property at issue in the City's condemnation action. What Ken owned at the time of the condemnation action was not what he owned when he sued the City for the additional taking – he unequivocally owned 4,058 sq. ft. less. While Ken's property may have retained the same parcel number, it was a different size and had different zoning and a different legal description. CP 7. Contrary to the trial court's conclusion, what was settled by the parties' stipulated agreement in the original condemnation action was not what was at issue in Ken's subsequent lawsuit. The trial court misinterpreted the stipulation and thus erred by dismissing Ken's complaint, which was specifically preserved in that stipulation.

(c) The trial court misapplied Washington's takings law

Ken leveled a number of inverse condemnation or "takings" claims against the City in his complaint. The City's defense was that the $150,000 that it paid to him under the terms of the stipulation was "just compensation" for the City's taking and fully compensated him for all of his damages, past, present, and future. CP 132-33. The trial court apparently agreed and dismissed the complaint. RP 30-31. The

fundamental flaw in the trial court's ruling is that the City took more property from Ken than what it paid just compensation for in the original condemnation action.

Article I, § 16 of the Washington Constitution states that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made." A property owner may bring an inverse condemnation[13] claim to "'recover the value of property which has been appropriated in fact, but with no formal exercise of the power of eminent domain.'" *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010) (quoting *Dickgieser v. State*, 153 Wn.2d 530, 534–35, 105 P.3d 26 (2005)).

To maintain an action for inverse condemnation, a plaintiff must show "'(1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings.'" *Id.* at 606 (quoting *Dickgieser*, 153 Wn.2d at 535); *Borden v. City of Olympia*, 113 Wn. App. 359, 374, 53 P.3d 1020 (2002), *review denied,* 149 Wn2.d 1021 (2003). In this context,

[13] Inverse condemnation is a property owner's cause of action against the government for the recovery of a loss of value to the owner's property, which the government caused but did not pay for. *Fitzpatrick*, 169 Wn.2d at 605. The theory of inverse condemnation was created by the courts to provide a remedy for a property owner whose property has been appropriated by the government and the government has been recalcitrant in its duty to initiate formal condemnation proceedings. *Pepper v. King County*, 61 Wn. App. 339, 347 n. 6, 810 P.2d 527 (1991). Because the government could not be sued in tort, inverse condemnation was developed to provide a remedy where none previously existed. *Id.*

a taking consists of an appropriation of private property without exercise of the power of eminent domain. *Phillips v. King County,* 136 Wn.2d 946, 957, 968 P.2d 871 (1998). The plaintiff must establish more than simply interference with his or her property rights. Rather, there must be a permanent or recurring interference that "destroys or derogates" a fundamental ownership interest. *Borden*, 113 Wn. App. at 374. *See also, Lambier v. City of Kennewick*, 56 Wn. App. 275, 283, 783 P.2d 596 (1989), *review denied,* 114 Wn.2d 1016 (1990) (for a taking to occur, the intrusion must be chronic and not merely a temporary interference that is unlikely to recur).

Here, Ken presented evidence of additional, uncompensated intrusions by the City beyond those covered by the stipulation. For example, he documented construction workers intentionally moving a fence to take property for the project that still belonged to him and was not included in the 4,058 sq. ft. right-of-way the City acquired in the condemnation action. CP 204. He also documented that the retaining wall the City installed as part of the project encroached onto his property beyond the boundaries of the right-of-way. CP 77-79, 205.

The trial court's error stems from its conclusion that the $150,000 Ken received from the City was just compensation for all of the City's takings. Not so. While the City's $150,000 payment may have covered

its appropriation of the right-of-way, it did not extend to the subsequent takings. First, the City never instituted formal proceedings to appropriate additional property from Ken for the project. It instituted formal proceedings to appropriate 4, 058 sq. ft. of his property *and nothing more*. The additional takings that Ken documented were outside the boundaries of the right-of-way; thus, the City directly appropriated additional land from Ken for which it owed him just compensation. Second, the City never compensated Ken for taking that additional property from him for public use.

By dismissing Ken's complaint, the trial court essentially granted the City free reign to do whatever it wants for the project on any part of Ken's property in perpetuity. The City was not given such unlimited rights when it appropriated 4,058 sq. ft. of property from Ken in return for the payment of $150,000.

The City destroyed Ken's quiet enjoyment of his property by taking property from him for public use; accordingly, a taking occurred for which just compensation should have been paid. That did not happen here because the trial court summarily dismissed Ken's complaint. Although the City compensated Ken for a small portion of his property acquired in the condemnation action, it did not compensate him for the additional

property that it took from him outside of that right-of-way. Summary judgment was therefore improper.

F. CONCLUSION

The trial court erred by dismissing the City on summary judgment. It did not resolve all of Ken's claims. But even if it did, summary judgment was inappropriate because genuine issues of material fact remained. The trial court erred by misconstruing the terms of the settlement and by misapplying Washington's takings law.

The Court should reverse the trial court's summary judgment order and remand Ken's case against the City for a trial on the merits. The Court should also award Ken costs on appeal.

DATED this 10th day of June, 2013.

Respectfully submitted,

Emmelyn Hart, WSBA #28820
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661
Attorneys for Appellant Kenneth Hauge

APPENDIX

☐ EXPEDITE
☒ Hearing is set:

Date: October 26, 2012
Time: 9:00 a.m.
Judge/Calendar: McPhee

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

KENNETH HAUGE, an individual, Plaintiff, vs. CITY OF LACEY, a municipal corporation, and THURSTON COUNTY, a subdivision of Washington State, Defendants.	)	No. 12-2-01303-6 **ORDER GRANTING SUMMARY JUDGMENT MOTION OF CITY OF LACEY, DENYING CROSS-MOTION FOR SUMMARY JUDGMENT OF PLAINTIFF AND DISMISSING ACTION**

This matter having come on for oral argument before the Court and the Court having considered the following documents filed herein:

1. Complaint for Inverse Condemnation and Damages.
2. Motion to Dismiss Pursuant to CR 12(b)(6) of the City of Lacey.
3. Memorandum in Support of City's Motion to Dismiss for Failure to state a claim.
4. Declaration of Kenneth R. Ahlf.
5. Declaration of Dean M. White.
6. Declaration of Dale Mix.
7. Plaintiff's Opposition to City's Motion to Dismiss and Cross-Motion for Summary Judgment.
8. Declaration of Blaise Jelinek.
9. Declaration of Kenneth Hauge.
10. Memorandum of City of Lacey in Reply to the Response of the Plaintiff and

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in Response to the Cross-Motion for Summary Judgment of the Plaintiff.

11. Declaration of Kenneth R. Ahlf.

12. Declaration of Dale Mix in Response to Plaintiff's Cross-Motion for Summary Judgment.

13. Declaration of Timothy Krause.

14. Plaintiff's Reply to City's Reply and Response.

15. Second Declaration of Kenneth Hauge.

16. First Amended Complaint.

17. Amended Order of Publication and Decision - No. 10-2-00653-7

18. Judgment - No. 10-2-00653-7

19. Decree of Appropriation - No. 10-2-00653-7

and, the Court having considered oral argument and finding that there are no relevant facts at issue, and that Defendant, City of Lacey, is entitled to judgment of dismissal as a matter of law, IT IS HEREBY

ORDERED, ADJUDGED AND DECREED that the Motion of the City of Lacey to Dismiss Pursuant to CR 12 (b)(6), which, for purposes of procedure, has been treated as a Motion for Summary Judgment herein, is hereby granted and the claims of the Plaintiff, are hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Cross-Motion for Summary Judgment submitted by the Plaintiff is hereby denied.

Dated this 26 day of October, 2012.

Judge Wm. Thomas McPhee

Presented by:

KENNETH R. AHLF, WSBA #0804
Attorney for City of Lacey

Approved as to form and Notice of Presentation Waived:

Lee H. Rousso, WSBA #33340
Attorney for Kenneth R. Hauge

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☐ EXPEDITE
☒ Hearing is set:

Date: March 4, 2011
Time: 9:00 a.m.
Judge/Calendar: Murphy

FILED
MAR 09 2011
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

CITY OF LACEY, a municipal corporation, and Thurston County, a subdivision of the State of Washington, Petitioners, vs. Carpenter Crest, LLC, a Washington Limited Liability Company, Fannie Mae, a corporation and Kenneth R. Hauge, an individual, Respondents.	No. 10-2-00663-7 **STIPULATION OF SETTLEMENT AS TO PARCEL 8**

IT IS HEREBY STIPULATED AND AGREED by and between the Petitioners, CITY OF LACEY and THURSTON COUNTY, by and through their attorney, KENNETH R. AHLF and KENNETH R. HAUGE, personally and by and through his attorney, C. SCOTT KEE, as follows:

I

The Respondent, KENNETH R. HAUGE, is the owner of that certain real property referred to as Parcel 8 and legally described in Article VII of the Amended Petition for Condemnation herein.

II

The parties agree that upon entry of a Judgment, deposit of the

ORIGINAL

KH 2-25-11

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Petitioners of the funds called for herein and distribution of those funds to Kenneth R. Hauge, that a Decree of Appropriation may be entered appropriating to THURSTON COUNTY that certain right-of-way described and shown in Exhibit 1, attached hereto.

III

It is agreed that the fair market value of the right-of-way together with all costs of evaluation and any other costs and fees incurred under Chapter 8.25 RCW, including attorney fees, is the sum of $150,000.00. Upon entry of a Judgment, the Petitioners shall pay into the registry of the Court the sum of $68,000.00 which, when added to the deposit previously made herein of the sum of $82,000.00 shall equal the stipulated amount of $150,000.00, which sum shall include all costs of evaluation and any other costs and fees incurred under Chapter 8.25 RCW, including attorney fees. The parties agree that the Clerk of the Court shall promptly tender said funds to Kenneth R. Hauge. Upon entry of a Judgment and the distribution of said sum to Kenneth R. Hauge, the Petitioners may present a Decree of Appropriation for entry with the Court.

IV

It is further agreed between the parties that as part of the construction of the Carpenter Road Improvement Project, the Petitioners agree that if any existing public or private utility lines serving the subject property are disrupted as part of the Carpenter Road construction that the Petitioners will, at their sole cost, reconnect such lines in a timely and workmanlike manner and that the Petitioners shall not take steps to in any manner force or require the connection of subject property to public sewer. This settlement grandfathers for life, Respondent's existing septic system as currently operated, until and unless such system becomes non-functional and

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non-repairable. It is further agreed by the Petitioners that neither this Stipulation nor the Judgment and Decree to be entered herein shall in any manner be used to prevent the Respondent from filing a separate action for displacement, negligence, personal injury, or any other road related action on the part of the Petitioners or their contractors or agents in constructing the Carpenter Road Improvement Project or relating to such roadway.

DATED this 25th day of February, 2011.

Respondent, KENNETH R. HAUGE

C. SCOTT KEE, WSBA #28173
Attorney for Respondent Kenneth R. Hauge

KENNETH R. AHLF / WSBA #0804
City Attorney for the City of Lacey and
Special Deputy Prosecutor for Thurston County

KH 2-25-11

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EXHIBIT 1

EXHIBIT "A"

Parcel Number: 48204000100

PARCEL:

The South 150 feet of the West 163.5 feet of Tract 40, Fleetwood Acres, according to the plat thereof recorded in Volume 10 of Plats, Page 5, records of Thurston County, Washington.

RIGHT OF WAY:

BEGINNING at the Southwest corner of the above said parcel, also being the easterly right of way of Carpenter Road Southeast, which is 16.50 feet easterly, measured perpendicular, of center line of Carpenter Road Southeast; thence along said right of way N02°19'47"E a distance of 150.03 feet to the north line of the above said parcel; thence along said north line S88°51'35"E a distance of 25.51 feet; thence parallel with said right of way S02°19'47"W a distance of 111.89 feet; thence S87°40'13"E a distance of 1.50 feet; thence parallel with said right of way S02°19'47"W a distance of 18.18 feet; thence S33°10'30"E a distance of 5.43 feet; thence S43°15'54"E a distance of 21.60 feet to the northerly right of way of 6th Avenue Southeast, which is 20.00 feet northerly, measured perpendicular, of center line of 6th Avenue Southeast; thence along said northerly right of way N88°51'35"W a distance of 45.60 feet to the point of beginning.

Containing: 4,058 sq. ft.

See Exhibit "B" attached hereto and by this reference made apart hereof.

(Description prepared under the direction of Lawrence J. Holt PLS 11958 on 01-08-2009.)

KH 2-25-11

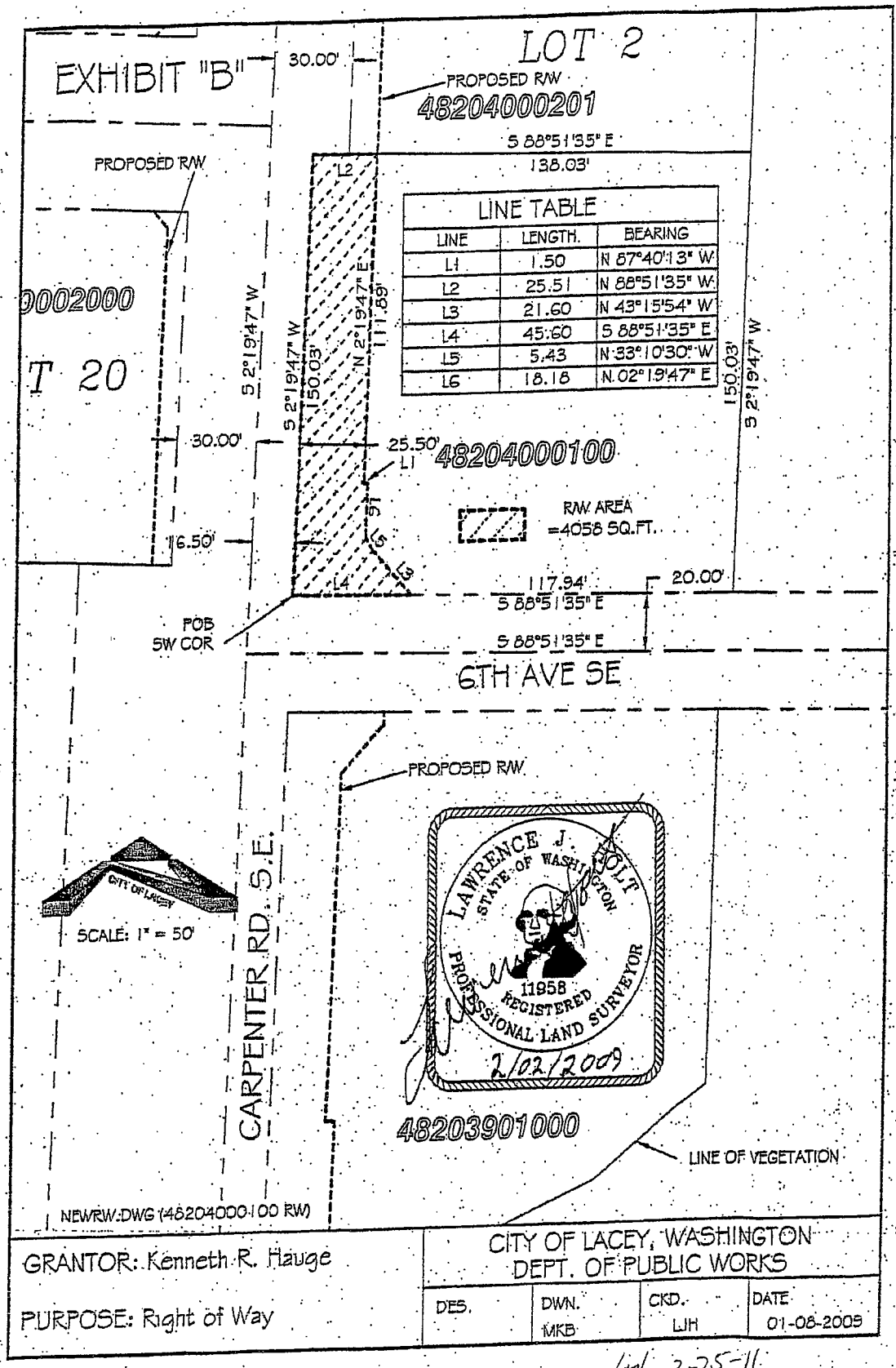
EXHIBIT "B"
LOT 2
30.00'
PROPOSED R/W
48204000201
S 88°51'35" E
138.03'
PROPOSED R/W
L2
LINE TABLE
LINE | LENGTH. | BEARING
L1 | 1.50 | N 87°40'13" W
L2 | 25.51 | N 88°51'35" W
L3 | 21.60 | N 43°15'54" W
L4 | 45.60 | S 88°51'35" E
L5 | 5.43 | N 33°10'30" W
L6 | 18.18 | N 02°19'47" E
0002000
T 20
S 2°19'47" W
150.03'
N 2°19'47" E
111.89'
S 2°19'47" W
150.03'
30.00'
25.50'
L1
48204000100
R/W AREA
=4058 SQ.FT.
16.50'
L5
L6
L4
117.94'
S 88°51'35" E
20.00'
POB
SW COR
S 88°51'35" E
6TH AVE SE
PROPOSED R/W
CITY OF LACEY
SCALE: 1" = 50'
CARPENTER RD. S.E.
LAWRENCE J. WOLT
STATE OF WASHINGTON
11958
REGISTERED
PROFESSIONAL LAND SURVEYOR
2/02/2009
48203901000
LINE OF VEGETATION
NEWRW.DWG (48204000100 RW)
GRANTOR: Kenneth R. Hauge
PURPOSE: Right of Way
CITY OF LACEY, WASHINGTON
DEPT. OF PUBLIC WORKS
DES.
DWN. MKB
CKD. LJH
DATE 01-08-2009

2-25-11

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Brief of Appellant in Court of Appeals Cause No. 44305-8-II to the following parties:

Ken Ahlf
1230 Ruddell Road SE, Suite 201
Lacey, WA 98503-5747

Original efiled with:

Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402-4427

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 11, 2013, at Tukwila, Washington.

Paula Chapler

Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE FITZPATRICK LAW

June 11, 2013 - 9:44 AM

Transmittal Letter

Document Uploaded: 443058-Appellant's Brief.pdf

Case Name: Kenneth Hauge v. City of Lacey, et al.

Court of Appeals Case Number: 44305-8

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Paula Chapler - Email: **paula@tal-fitzlaw.com**